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HEALTH LAW

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Physician-Assisted Dying: *What Does It Mean for Long-Term Care?*

Our nation's highest court has legalized physician-assisted dying ("PAD") (also known as MAID, or medical assistance in dying) in Canada. For decades, health practitioners, ethicists, academics, lawyers, judges, politicians and Canadians generally have been debating the medical, legal and ethical implications of PAD. Despite all of this discussion, the recent decriminalization of PAD still gives rise to many unanswered questions.

Background: The *Carter* Decisions

On February 6, 2015, in *Carter v. Canada (Attorney General)* ("*Carter*"), the Supreme Court of Canada held that the criminal laws prohibiting assistance in dying are unconstitutional. According to the Court, s.241(b) (assisting suicide) and s.14 (no person may consent to death) of the *Criminal Code* (the "*Code*") unjustifiably infringe s.7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), which guarantees an individual's fundamental rights to life, liberty and security of the person.

The Court found that the laws prohibiting PAD interfere with liberty by constraining the ability of individuals suffering from grievous and irremediable medical conditions to make decisions concerning their bodily integrity and medical care, and infringe upon security of the person by leaving such individuals to endure intolerable suffering. As a result, the Court declared the impugned provisions of the *Code* to be void insofar as they prohibit PAD for a competent adult person who: (i) clearly consents to the termination of life; and (ii) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition (the "*Carter* criteria").

The Court suspended its declaration of invalidity for one year (until February 6, 2016) to allow Parliament and the provincial legislatures time to enact laws to regulate PAD. In January 2016, in a separate decision in the *Carter* case, the Court granted a four-month extension of the suspension of its declaration of invalidity. Consequently, the *Code* provisions at issue will be invalid

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effective June 6, 2016. Hence, new legislation regulating PAD must be in place prior to that date.

Until June 6, 2016, the Court has allowed individuals who meet the *Carter* criteria to apply to the superior court of their jurisdiction for an order authorizing PAD and exempting them and their medical practitioners from criminal liability. To date, there have been several successful applications for judicial authorization of PAD across the country, including in Ontario, Manitoba, Alberta and British Columbia. Quebec was granted an exemption from the four-month extension by the Court given that it had already passed legislation regulating PAD.

The new federal legislation for assisted death: Bill C-14

On April 14, 2016, the liberal government responded to *Carter* and introduced Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) into the House of Commons for first reading.

Pursuant to Bill C-14, physicians and nurse practitioners will be exempt from criminal liability for providing medical assistance in dying, and pharmacists and other persons are permitted to assist in the process. However, Bill C-14 limits medical assistance in dying to persons who: (i) are eligible for health services funded by a government in Canada; (ii) are at least 18 years old and capable of making decisions with respect to their health; (iii) have voluntarily requested and given informed consent to receive medical assistance in dying; and (iv) have a grievous and irremediable medical condition.

With respect to this last criterion, to qualify, a person must have a serious and incurable illness, disease or disability that causes enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable. These requirements are consistent with the *Carter* criteria. As well, Bill C-14 states that the individual requesting medical assistance in dying must be in an advanced state of irreversible decline in capability and their natural death has become reasonably foreseeable. These last two requirements go beyond the *Carter* criteria.

The proposed legislation has been criticized by proponents of PAD for a number of reasons. The foremost criticisms are that the Bill unfairly excludes persons who suffer from non-terminal illnesses who are not close to death, mature minors and persons suffering from mental illness (as the sole underlying condition) from accessing medical assistance in dying. Bill C-14 has also been faulted for not permitting advance requests for medical assistance in dying.

On May 4, 2016, Bill C-14 was debated at second reading and referred to a committee. The Standing Committee on Justice and Human Rights will soon be conducting a study on the proposed legislation and will consider recommendations for changes.

Implications for Long-Term Care

Although Bill C-14 has not addressed many issues relating to PAD, the current draft has made a few matters clearer for the long-term care sector:

- Residents living in long-term care homes who are eligible will be entitled to receive medical assistance in dying;
- Advance requests for medical assistance in dying are not permissible;
- Substitute decision-makers are not able to consent to medical assistance in dying on behalf of residents;
- Medical and nurse practitioners may provide medical assistance in dying to residents (either by administering a substance or prescribing a substance for self-administration), and may seek assistance from others;
- Owners or operators of long-term care homes at which an individual requesting medical assistance in dying resides, and the staff directly involved in providing care to the individual, may not witness such requests (which must be made in writing); and
- Knowingly failing to comply with all of the requirements for medical assistance in dying will result in criminal liability.

What remains to be seen, and hopefully will be addressed in the final version of Bill C-14 or in

provincial legislation, includes the following:

- Will owners and operators be permitted to make conscientious objections to providing medical assistance in dying? Will faith-based long-term care homes be permitted to object to providing medical assistance in dying?;
- If long-term care homes cannot object, will they be required to provide medical assistance in dying as a service to their eligible residents, or will allowing a resident to self-administer or bring in an external medical or nurse practitioner be sufficient?;
- If long-term care homes can object, must they arrange for the transfer of a resident to a non-objecting facility for medical assistance in dying? What information about the resident, if any, will the home be required to provide to the non-objecting facility?;
- Will long-term care homes be required to inform residents and potential residents of any institutional position on medical assistance in dying, including limits on its provision?;
- If medical and nurse practitioners are permitted to make conscientious or faith-based objections, must long-term care homes ensure that they have a non-objecting practitioner on staff?;
- Will long-term care homes be required to safely store substances prescribed to residents so that residents may self-administer to cause their own death?;
- What reporting requirements will apply to long-term care homes (e.g. reports to the coroner, Ministry of Health and Long-Term Care or as may be required by the new legislation)?;
- Will long-term care homes be required to educate and train their staff on compliance with the laws regarding medical assistance in dying?; and
- Will long-term care homes be required to satisfy themselves that a resident is eligible for medical assistance in dying, or will there be an independent body to conduct such reviews?

Many uncertainties continue to surround the issue of PAD. Until we have legislation in force regulating medical assistance in dying, owners and operators of long-term care homes, and their staff, should proceed cautiously:

- We recommend not initiating discussion about PAD with residents or their families.
- If approached for information about PAD, staff should immediately advise the medical director, attending physician or administrator who will be in a position to review guidelines published by professional regulatory bodies (e.g. CPSO, CNO, OCP) and seek legal advice.

If you require any advice or assistance with responding to inquiries regarding PAD and your obligations, please contact me at (416) 643-8800 or lcorrente@torkinmanes.com.